Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-407

BEN HAKE; JOSEPH J. HUNT, JR., President, JOSEPH J. HUNT, SR., Secretary-Treasurer, and SAM SHERELL, Business Agent, all Officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396, and RAYMOND D. RHODES, H. WAYNE RHODES, THOMAS J. SHIRLEY, DAVID KLEINDIENST, and PAUL E. KLEINDIENST, All Members of Local 396, and as Officers and Representatives of a Class Consisting of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396,
Petitioners,

vs.

SHIRLEY HELTON, Individually; SHIRLEY HELTON, as Administratrix of the Estate of Norman R. Helton, Deceased; RICKY HELTON and JO ANN HELTON, by SHIRLEY HELTON, Their Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals, Kansas City District

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To the Missouri Court of Appeals, Kansas City District

Ben Hake, et al., representatives of a class comprising the membership of International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, Local 396, your Petitioners, pray that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Kansas City District, entered in this case on February 27, 1978.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Kansas City District (App. A, infra, A-1-A-18) is reported at 564 S.W. 2d 313: The judgment of the Circuit Court of Cole County, Missouri (App. B, infra, A-19-A-21) is not reported. The Memorandum and Order Remanding Cause to the Circuit Court for Cole County, Missouri of the United States District Court for the Western District of Missouri (App. C, infra, A-22-A-33) is reported at 386 F. Supp. 1027.

JURISDICTION

The opinion of the Missouri Court of Appeals, Kansas City District, was entered on February 27, 1978 (App. A, infra, A-1). The time of entry of the opinion was not recorded in the Court below. On April 3, 1978, the Missouri Court of Appeals denied Petitioners' motion for rehearing and denied transfer to the Supreme Court of Missouri (App. D, infra, A-34). On May 9, 1978, the Supreme Court of Missouri denied the application of Petitioners for transfer of this cause from the Missouri Court of Appeals to the Supreme Court of Missouri (App. E, infra, A-35). By order dated July 31, 1978, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Respondents, the administratrix of the estate and surviving spouse of Norman Helton, and certain of his minor children, brought this action against Petitioners contending that the duly-

designated steward of Local 396, Iron Workers, negligently failed to enforce certain safety provisions of a collective bargaining agreement on a job project on which the decedent was employed, thereby causing the death of Helton. Petitioners, in defense to the suit, asserted that this matter was an action under Section 301(a) of the Labor Management Relations Act relating to the alleged failure of the Union to fairly represent the decedent and the courts were required to apply federal law rather than state law. Petitioners filed a petition for removal of this action to the United States District Court, Western District of Missouri alleging that the matters pleaded by Respondents granted original jurisdiction to the United States District Courts and that the matters complained of came within Section 301(a) of the Labor Management Relations Act. The United States District Court and the state courts rejected the position of Petitioners that the matter related to the Union's representation of decedent under Section 301(a) and applied state law to the case in direct conflict with the holding of the United States Court of Appeals for the Sixth Circuit in *Bryant v. United Mine Workers*, 467 F. 2d 1 (1972), cert. den., 410 U.S. 930; the Third Circuit Court of Appeals in *Bazarte v. United Transportation Union*, 429 F. 2d 868, and the Supreme Court of the United States in *Amalgamated Association of Street, Electric, Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274; *Vaca v. Sipes*, 386 U.S. 171; and *Farmer v. Carpenters, Local 25*, 430 U.S. 290. The question presented is:

1. Whether a suit based upon the Union's failure to enforce the terms of a collective bargaining agreement falls within the scope of Section 301(a) of the Labor Management Relations Act, as amended, thereby requiring application of federal law.

STATUTE INVOLVED

This case involves the application of Section 301(a), Labor Management Relations Act, as amended, 1959, 29 U.S.C. § 185(a), which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

A. The Facts

The decedent, Norman Helton, was fatally injured on September 11, 1973 while employed as an ironworker at a construction project in Salem, Missouri. Helton was employed by Maggi Construction Company in the erection of a metal building. At the time of his death, Helton had been a member of Iron Workers Local 396 since August, 1971. On the job with Helton was Ben Hake who was acting as steward for Local 396 on the construction project.

The metal building on which decedent and other members of the crew were working in Salem, Missouri was at an angle to some 7200 volt electric power lines operated by the City of Salem. The area where Helton was working at the time of his death was about 7.5 feet from the power lines.

The work in progress at the time of Helton's death consisted of the attachment of angle irons to the building. Helton was working directly with another employee bolting up the angle

iron to the girder and he was standing on the girders pulling the angles into the structure so the iron could be bolted. An angle iron which Helton was handling came into contact with the power lines; Helton fell to the ground and was taken to the hospital where he died. The direct cause of death was cardiac arrest caused by electric shock.

There was testimony on trial that Helton had complained about the nearness of the power lines within proximity to where Steward Hake was standing with other members of the crew.

At the time of the accident, the Union had a collective bargaining agreement in effect with the Associated General Contractors of St. Louis, Erectors and Riggers Association, and Site Improvement Association.[1] In pertinent parts, the collective bargaining agreement stated:[2]

> **Article 7**
>
> * * * * * * *
>
> *Section 7.20 Stewards:* There shall be a steward on each job who shall be appointed by the Business Representative from the men on the job. The steward shall promptly take care of injured employees and accompany them to their home or to a hospital without any loss of pay.
>
> * * * * * * *

---

[1] There was no direct evidence that the employer was bound by the collective bargaining agreement. The Court below found that the employer was bound by the collective bargaining agreement by implication (App., infra, A-4, A-5).

[2] As used therein, citations to the Transcript on Appeal in the Court below appear as "Tr." followed by the page number. References to the Supplemental Appendix on Appeal in the Court below are referred to as "Supp. Tr." followed by the page number. Respondents' Exhibits are referred to as "RE" followed by the page number. Petitioners shall request certification of the record by the Clerk of the Court possessing it.

The parties agree that the steward shall have no authority to induce, encourage, cause or condone any strike, work stoppage or interruption of work.

For the convenience of the Union, the job steward shall keep a record of workers laid off and discharged, take up all grievances on the job, try to have same adjusted, and in the event he cannot adjust them, he must promptly report same to proper officers of the Union so that an effort can be made to adjust any matter without a stoppage of work. He shall see that the provisions of these working rules are complied with and report to the Union the true conditions and facts. He shall report the injury of any employees to the proper officers of the Union.

It is understood and agreed that the Employer is in no way responsible for the performance of these functions by the steward. (RE 16, page 28)

Section 7.21 Safety Review Committee: A four (4) member subcommittee, two (2) from Union and two (2) from the Associations, will be formed to review alleged safety violations by Associations' members. If subcommittee cannot reach agreement, the entire Iron Worker Committee will meet. This subcommittee will meet on twenty-four (24) hour request by either party to formulate a recommendation for the proper course of action. (RE 16, page 29)

* * * * * * * *

Section 7.28 Power Lines, High Tension: There shall be no work done in the immediate area of high tension lines until the power has been shut off, or the lines insulated, or the safety of the members of bargaining unit otherwise provided for. (RE 16, page 30)

During 1973, the parties to the agreement between Local 396 and the Associations had established a safety committee comprised of union representatives and contractor representatives (Tr. 249).

Respondents commenced their action in the Circuit Court of Cole County, Missouri by the filing of a three count petition alleging, *inter alia*, wrongful death, property damage and punitive damages. Count I of the petition against the City of Salem, Missouri was dismissed prior to trial (Tr. 29). Counts II and III of the petition were against Petitioners as representatives of a class comprising the membership of International Association of Bridge, Structural and Ornamental Iron Workers Local No. 396 (Local 396) and Ben Hake, individually.

On April 15, 1974, the Petitioners filed a Petition for Removal of this action from the Circuit Court of Cole County to the United States District Court for the Western District of Missouri (Supp. Tr. 3). The removal petition alleged that the matter came within the purview of Section 301(a) of the Labor Management Relations Act and that the District Courts of the United States had original jurisdiction of the suit. By order dated December 6, 1974, the District Court remanded this cause to the Circuit Court of Cole County for all further proceedings (App. C, infra, A-33). The District Court held that the action was one based upon common law tort and did not constitute a suit under Section 301(a) and was therefore outside federal jurisdiction.

Petitioners filed a Motion to Dismiss Counts II and III (Tr. 17) which was overruled and on July 29, 1975, Petitioners filed their answer to Counts II and III of the petition, including their affirmative defenses (Tr. 25-28). Trial commenced on March 2, 1976 in the Circuit Court of Cole County, Missouri. On March 4, 1976, jury verdict on Count II in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) was awarded to Respondents which, by remittitur, was reduced to Forty-Seven Thousand Five Hundred Dollars ($47,500.00) by order dated March 8, 1976 (App. B, infra, A-20). Petitioners filed timely Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for New Trial (Tr. 289) which was overruled.

B. Judgment of the Circuit Court

Petitioners raised the federal questions sought to be reviewed herein by Motion to Dismiss Counts II and III of the petition as to them filed on December 30, 1974 (Tr. 17). The motion was overruled without opinion in July, 1975 and Petitioners reasserted the federal questions in its answer to the petition as their second and third affirmative defenses (Tr. 25, 27). At the conclusion of Respondents' evidence on trial, Petitioners reasserted the federal questions sought to be reviewed by motion for directed verdict which was overruled by the trial court (Tr. 199) as were Petitioners' renewal of the motions for dismissal and for directed verdict at the close of all the evidence (Tr. 263). Petitioners, in their post trial motion for judgment notwithstanding the verdict or for new trial, posed the federal questions at Paragraphs 5, 8 and 12 of the Motion (Tr. 289-292). The Motion was overruled by reason that the Court failed to act on the Motion within 90 days of its filing, thereby making the judgment against Petitioners final.

C. Holdings Below

The Court below affirmed the judgment of the Circuit Court (App. A, infra, A-18). In reliance upon the Memorandum of the United States District Court, Western District of Missouri, ordering the remand of this matter from the District Court to the Cole County Circuit Court, (App. C, infra, A-22), the Court below held that Respondents did not state a claim under Section 301(a) of the Labor Management Relations Act for enforcement of a collective bargaining agreement (App. A, infra, A-5-A-7), and that state law was not preempted by overriding federal labor law (App. A, infra, A-7-A-14). The District Court had held that Respondents' complaint did not allege a breach of the Union's duty of fair representation (App. C, infra, A-25-A-27), and further that there was no jurisdiction under Section 301(a), Labor Management Relations Act, since the action was predicated on negligence and was not predicated on enforcement of a collective bargaining agreement (App. C, infra, A-27-A-33).

REASONS FOR GRANTING THE WRIT

The holdings of the courts below are erroneous and in contravention with established national labor policy. These courts have erroneously held that a suit based upon failure to enforce a collective bargaining agreement falls outside the scope of Section 301(a) of the Labor Management Relations Act. The courts further erred in failing to hold that a suit based upon the failure to enforce a collective bargaining agreement relates to whether or not the labor organization has fairly represented employees covered by the collective bargaining agreement.

The Courts below have failed to recognize that rights of members suing upon promises contained in a collective bargaining agreement relate to the duty of the Union to fairly represent the members and such suit is cognizable under Section 301(a). *Amalgamated Ass'n. of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274; *Smith v. Evening News*, 371 U.S. 195. The courts below have attempted to expand the duty of fair representation by imposing upon a labor organization a common law duty of due care in its representation of employees covered by a collective bargaining agreement which is repugnant to the holdings of this Court in *Vaca v. Sipes*, 386 U.S. 171 and *Humphrey v. Moore*, 375 U.S. 335.

The duty of fair representation is designed to apply to the entire scope of a union's services and functions relating to the negotiation, administration and enforcement of collective bargaining agreements. *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Humphrey v. Moore, supra.* The duty of fair representation is breached when the Union has engaged in arbitrary or bad faith conduct, *Vaca v. Sipes, supra*, or fraudulent, deceitful or dishonest conduct, *Humphrey v. Moore, supra.* Negligent conduct on the part of a labor organization in performing its representational services does not suffice to state or prove a claim for breach

of fair representation. The traditional tort law concepts have no place where this subject area of labor management relations is concerned. *Bazarte v. United Transportation Union*, 429 F. 2d 868; *Dente v. International Organization of Masters, Mates and Pilots*, 492 F. 2d 10; *deArroyo, et al. v. Trabajadores Packing House*, 425 F. 2d 821.

The reasoning of the courts below is defective in the analysis by them of the nature of the suit brought by Respondents. A suit for failure to enforce a collective bargaining agreement is no different than a suit grounded upon the failure of a labor organization to fairly represent employees covered by the collective bargaining agreement. The rights of the parties arise out of the provisions of the labor-management agreement and relate to the mutual promises of the parties to the agreement. The rights of Respondents arise out of the agreement and may not be deemed independent of the provisions of the collective bargaining agreement. Therefore, the duties imposed upon the Union exclusively relate to the duty to fairly represent the employees covered by the agreement.[3]

The courts below have attempted to delineate an area in which federal labor policy does not apply and has not been preempted by federal labor laws. However, the subject matter of Respondents' cause of action against Petitioners is one directly involved with the duty of the Union to adequately and fairly represent the decedent under a collective bargaining agreement. This action is not one which may be considered to lie within an area that has been left to the states by the national labor policy. *Farmer v. Carpenters, Local 25*, 430 U.S. 290; *San Diego Building Trades v. Garmon*, 359 U.S. 236; *Linn v. Plant Guard Workers*, 283 U.S. 53; *Automobile Workers v. Russell*, 356 U.S. 634; *International Association of Machinists v. Gonzales*, 356 U.S. 617; *Motor Coach Employees v. Lockridge, supra; Vaca v. Sipes, supra.*

[3] The Court below erroneously concluded that the conduct of the Union was outside the protection afforded by the National Labor Relations Act (App., infra, A-8). Such view is erroneous and irrelevant as breach of the duty of fair representation regardless of unfair labor practices is actionable under Section 301(a). *Vaca v. Sipes, supra; Smith v. Evening News, supra.*

Petitioners respectfully submit that this petition for writ of certiorari should be granted because the impact of the decisions of the Court below falls upon labor organizations across the nation to their detriment and involves a novel question of law which should be settled by this Court to avoid impairment of the national labor policy as enunciated by the Congress of the United States.

The introduction of safety standards for employees covered by a collective bargaining agreement must be recognized as a goal of collective bargaining. "To saddle labor unions with liability for the [employer's] failure to comply with standards introduced into the contract at the union's bidding would simply be to discourage the inclusion of similar or more effective standards in labor contracts. Such results would not serve the interest of [employees] and would retard rather than advance the goals of the National Labor Policy." *Bryant v. United Mine Workers*, 467 F. 2d 1, 5-6. The policy set forth in *Bryant, supra*, has been disregarded by the holdings of the courts below, and is contrary to the body of federal law fashioned by the federal courts pursuant to the enactment of Section 301(a) of the Labor Management Relations Act. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448. The holdings of the courts below represent a failure of those courts to apply federal law so that a comprehensive federal regulatory scheme covering employee self-organization and collective bargaining may be preserved and uniformly applied. *Motor Coach Employees v. Lockridge, supra; Bryant v. United Mine Workers, supra; Buzzart v. Local Lodge 1040, IAM*, 480 F. 2d 35.

Petitioners submit that Respondents' cause of action arises pursuant to the duty of the Union to represent the decedent under the terms of the collective bargaining agreement. Any action brought by reason of such representation must be decided based upon federal law and is within the purview of Section 301(a), Labor Management Relations Act, 29 U.S.C. 185(a). *Vaca v. Sipes, supra; Humphrey v. Moore, supra.*

By their decisions, the courts below have impaired the national labor policy under Section 301(a) and misdirected the duties owed by a labor organization to employees represented by it under collective bargaining agreements. The decision of the Court below is inconsistent with the development of a sound body of federal law for enforcement of labor agreements under Section 301(a).

If permitted to stand, the holdings of the courts below will have a chilling effect upon union goals and objectives in collective bargaining. The effect of the holdings of the courts below shall require the deletion of safety provisions from collective bargaining agreements and will thwart a legitimate collective bargaining objective to the detriment of employees throughout the nation.

CONCLUSION

Upon all the reasons set forth herein, Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

Opinion (Filed February 27, 1978)

Missouri Court of Appeals
Kansas City District

Shirley Helton, et al.,
Respondents,

vs.

Ben Hake, et al.,
Appellants.

Nos. KCD28896
KCD28897
(Consolidated)

APPEAL FROM THE CIRCUIT COURT OF
COLE COUNTY
HONORABLE BYRON L. KINDER

Before Shangler, P.J., Wasserstrom, J., and Mason, Sp.J.

Suit for wrongful death of Norman Helton brought by his widow and children against International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local No. 396 and the Union steward Ben Hake. From a judgment on a jury verdict for plaintiffs, both sides appeal. We affirm.

On September 11, 1973, Helton was working as an iron worker for Maggi Construction Company in the construction of a metal building in Salem, Missouri. A high tension power line ran along side the building under construction and came within 7½ feet of the point where Helton was working.

The work in progress at the time of Helton's death consisted of the attachment of angle irons to the building. The angle irons were about 20 feet long and were raised hand over hand for

positioning onto a channel girder. Helton was working directly with Perry McCormack bolting up the angle iron to the girders. No one actually witnessed how Helton came to fall from the building, but a loud crack of electricity was heard, and immediately thereafter Helton was seen falling in the air from the place where he had been working. Apparently an angle iron which he was handling came into contact with the power line, causing his electrocution. He was taken to a hospital, but never regained consciousness. His death was diagnosed by the attending doctors as cardiac arrest caused by electric shock.

Mrs. Helton testified that Helton had told her the morning of his death that he had asked for the power in the high tension line to be turned off and that he was going to ask again. A co-worker further testified that preceding the accident Helton talked about the power line being close to the place of work and that the line should be covered; this statement took place in the presence and hearing of a number of the crew, of whom Hake was one and of whom the foreman Loethen was another.

At the time of the fatal accident, the Union had a collective bargaining agreement in effect which had been signed on behalf of Associated General Contractors of St. Louis, Erectors and Riggers Association, and Site Improvement Association. Article 7 of that Agreement is entitled "Working Rules" and contains as a sub-part "Safety Provisions." Part of that subdivision provides:

> "Section 7.28 *Power Lines, High Tension*: There shall be no work done in the immediate area of high tension lines until the power has been shut off, or the lines insulated, or the safety of the members of bargaining unit otherwise provided for."

Section 7.20 of that same article provides that the Union steward "shall see that the provisions of these working rules are complied with and report to the Union the true conditions and facts. He

shall report the injury of any employees to the proper officers of the Union." This same section goes on to provide "that the Employer is in no way responsible for the performance of these functions by the steward."

Plaintiffs premise their law suit on the theory that the provisions of the collective bargaining agreement quoted created a duty on the Union steward Hake and through him upon the Union to safeguard the employees, including Helton, from the power line adjacent to the work place and that their failure to perform that duty constituted a tort for which recovery can be had under the wrongful death statute. The verdict directing instructions adopted that theory and instructed the jury to find for the plaintiff if (among other things) Maggi and the Union were operating under the terms and conditions of the collective bargaining agreement, if Hake had a duty to enforce and failed to enforce the provision of Section 7.28 of the contract, and if Hake was thereby negligent. The trial court, although requested to do so by plaintiffs, refused to submit to the jury any issue relating to assessment of punitive damages against defendants in connection with damage to Helton's gloves and boots.

For their points on appeal, defendants assert: 1) that there was no proof that there was any agreement in force with respect to the Maggi construction project; 2) that the Union's obligation was limited to that of "fair representation" and that it was not liable to Helton nor is it liable to his survivors for mere negligence; 3) that Helton was guilty of contributory negligence; 4) that plaintiffs did not comply with the requirements for a class action as provided by statute and court rule; and 5) that the trial court improperly limited the testimony of Hake. Plaintiffs for their part assign as error the refusal of the trial court to submit the issue of punitive damages.

I

Under the court's instructions, in order to find for plaintiffs, the jury had to find that Maggi and the Union were operating under the terms and conditions of the agreement in evidence and which has been quoted above. That agreement by its terms was entered into with the Union on behalf of three employer associations. According to the evidence, Maggi was not a member of any of those three associations nor had it signed individually, nor was there any evidence that it had expressly agreed to be bound by that contract. Because of this state of proof, defendants insist that plaintiffs failed to prove an essential element of their case and a verdict should have been directed for defendants.

There was however substantial evidence from which it could be reasonably inferred that Maggi and the Union had agreed at least by implication to operate under the terms of the collective bargaining agreement. Thus the evidence shows that the Maggi foreman employed all of the workmen on this job, including Helton, through the Union field steward, Leon Henderson. The testimony was that Maggi could not hire any workmen "without the union's O.K."

Still further, the Union did appoint Hake steward on the job in compliance with the provisions of Section 7.20 of the contract. Hake in his testimony acknowledged that as steward he had the job of enforcing the working rules as set forth in the contract. Hake answered affirmatively to the proposition that these provisions constituted "the working rules by which you ply your trade" and that the contract was his "Bible." Worthy of special note is the fact that in recognition of his duties under the contract, Hake filed a Steward's Weekly Report, reporting on the accident which had resulted in Helton's death, showing that five workmen, all members of the Union in good standing, were on the job and that Helton had suffered death from electrocution on September 11, 1973.

Moreover and conclusive against defendants on this point, they have pleaded and affirmatively relied upon as a defense a collective bargaining contract covering the Maggi job. Thus the second affirmative defense of their answer alleges that "[d]efendant Iron Workers Local 396 is limited by the provisions of the collective bargaining agreement, referred to in Plaintiffs' Petition * * *," and their third affirmative defense alleges that "[d]efendant Iron Workers Local 396 is not liable to Plaintiffs for the death of decedent by reason of its alleged negligence, if any there be, in enforcing its collective bargaining agreement with the employer of decedent * * *." Where, as here, a defendant pleads a fact, it may not mount an argument directly contrary thereto. Hall v. Brookshire, 363 Mo. 774, 267 S.W.2d 627, 630[4] (banc 1954); 31 C.J.S. Estoppel Sec. 117 b., p. 623, and Sec. 118 b., p. 631.

II

In denying that they can be liable to plaintiffs in tort, defendants make a two-fold argument. They say: A. That "Plaintiffs may not bring a tort action against Defendants for violation of the collective bargaining agreement;" and B. That even if state law permits such a tort action, application of that state law would subvert the national labor policy under which a union's liability is limited to providing fair representation as collective bargaining agent.

A

Contrary to defendants' contention, the Missouri cases hold that liability in negligence may grow out of the breach of a duty imposed by a contract. Helm v. Inter-Insurance Exchange, 354 Mo. 935, 192 S.W.2d 417 (banc 1946); Braun v. Riel, 40 S.W.2d 621 (Mo. 1931); Ellyson v. Missouri Light & Power Co., 59 S.W.2d 714 (Mo. App. 1933); Peitzman v. City of

Illmo, 141 F.2d 956 (8th Cir. 1944); Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968). So it was said in the *Braun* case, *supra*, at l.c. 623:

> "It is well settled that, while a 'tort' is a wrong done independent of contract, there are torts committed in the nonobservance of contract duties. And if a tort arising out of nonobservance of such duties results in a death, a surviving person entitled to sue may avail himself of the Wrongful Death Statute."

This point has been reviewed in this very case by Judge Hunter in Helton v. Hake, 386 F.Supp. 1027 (D.C. Mo. 1974). After the filing of this suit in the circuit court, defendants filed a petition for removal to the United States District Court alleging federal jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Sec. 185(a). That section authorizes suits in the federal District Court for violation of a collective bargaining agreement without respect to the amount in controversy or the citizenship of the parties. Defendants' theory on the removal proceeding, as it is here, was that plaintiffs' cause of action arose out of and was for the purpose of enforcing the safety provisions of the collective bargaining agreement. Plaintiffs filed a motion to remand, denying that their cause of action was on the contract and insisting instead that their cause of action was in tort. Judge Hunter (a former member of this court) ruled in favor of the plaintiffs and remanded the case to the state circuit court, stating in part as follows at l.c. 1031:

> "In the instant case, taking the allegations contained in the complaint as true, the contract did impose upon the defendant union an affirmative duty to enforce safety rules. The complain alleges that the union, through its agent, the steward, negligently and carelessly failed to enforce the safety rule relating to work in the area of high tension power lines. The suit is clearly brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bargaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty. That defendants' duty may have arisen under a contract does not in and of itself change the basic nature of this action, which is a suit in tort to recover damages for injuries sustained due to defendants' alleged negligence. Compare Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968)."

Judge Hunter, thoroughly conversant as a lawyer and judge with Missouri law, has held that the facts of this case confer upon plaintiffs a cause of action for negligence. We concur and adopt that opinion.

B

The discussion now comes to defendants' principal argument and what is by all odds the most substantial point in this case. Defendants argue that even if plaintiffs have a cause of action for negligence under Missouri law, such state law may not be applied because of alleged conflict with an overriding federal labor law policy to the contrary.

As defendants correctly say, the extent to which federal labor law takes hold and preempts state law was formulated and is still expressed by Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). In that case, the plaintiff employee had been discharged at the instance of his union because of his failure to pay dues to the union on time. The plaintiff alleged that the discharge violated the union rules and the provisions of the collective bargaining contract, and he brought suit against the union for damages in the state court. The United States Supreme Court held that state court jurisdiction had been pre-

empted by the National Labor Relations Act saying in this respect that: "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield."

The plaintiff employee then sought an exemption from that preemption rule under the principle that Section 301 deliberately chose to give federal and state courts concurrent jurisdiction over violation of collective bargaining contracts, unaffected by the general jurisdiction of the National Labor Relations Board over labor matters. Answering that contention, the Supreme Court stated that in order to come under the Section 301 exception, there must be some arbitrary or bad faith conduct by the Union in breach of its duty of fair representation.

Defendants' effort to bring themselves within the *Lockridge* principle fails for the reason that this case need not and does not depend upon Section 301 in order to escape federal preemption. The failure of the Union steward Hake to enforce the safety provisions of the collective bargaining contract is in no way protected by Section 7 of the National Labor Relations Act nor could it constitute an unfair labor practice under Section 8 of that Act. See Farmer v. United Broth. of C. & J. of America, Local 25, — U.S. —, 97 S.Ct. 1056 (1977). Plaintiffs therefore need not attempt to bring themselves under Section 301, and they have made no effort to do so. This point was specifically ruled by Judge Hunter in Helton v. Hake, *supra*, at l.c. 1033 as follows:

> "The central issue raised by the complaint does not concern any wrongful act or failure to act on the part of the employer, but is based totally upon a negligent act or failure to act on behalf of the union, arising out of a duty owed to the employee by a specific union promise contained in the collective bargaining agreement. As previously stated, no claim for a breach of the duty of fair representation is made by the plaintiffs.[5]
>
> "It is this Court's conclusion, in view of all of the foregoing that the complaint herein cannot properly be considered a suit for violation of a contract within the meaning of Section 301(a). Rather, this is a suit predicated upon negligence, seeking damages for the alleged wrongful death of plaintiffs' deceased. Merely because some interpretation of the contract appears to be necessary to the determination of the nature, scope or extent of the duty owed does not, in and of itself, categorize this cause as an action for violation of the contract so as to grant jurisdiction to this Court under Section 301(a). To adopt defendant's view in this case would lead to the inescapable conclusion that any case in which interpretation of a collective bargaining agreement may be involved vests jurisdiction in the federal district courts under Section 301(a), regardless of the actionable wrong complained of or the relief sought, or how directly or indirectly related the collective bargaining agreement is to the action. * * * Plaintiffs herein are not praying for reinstatement or back wages, or for an improvement in working conditions. They are not employees or union members, but rather survivors bringing suit under the Missouri wrongful death law. Defendants have not suggested and it does not appear that any overriding federal labor policy is present that would warrant a construction of Section 301 to grant jurisdiction to this Court in this case."

Footnote 5 to the foregoing text reads as follows:

> "5. Defendants, in their separately filed motion to dismiss the complaint, contend that this complaint is really only a suit for denial of fair representation, and that as such, it fails to state a claim upon which relief could be

granted because it alleges only negligent conduct on the part of the union defendants. Defendants further argue that a suit for denial of fair representation is the only method by which the union's actions can be challenged. Were this Court to adopt this rationale, it would lead to the inevitable result that a union's negligent performance or negligent failure to perform a duty owed to an employee which resulted in that employee being injured would not be actionable in any way."

Notwithstanding that well reasoned opinion, defendants take sharp issue with it and claim it to be opposed to two other Federal opinions, Bryant v. International Union U.M.W. of America, 467 F.2d 1 (6th Cir. 1972) and House v. Mine Safety Appliances Co., 417 F.Supp. 939 (D.C. Idaho 1976). Each of those cases is distinguishable.

In *Bryant*, the representatives of the estates of eight dead miners brought actions in the federal District Court against the union on the ground that the union had breached its obligation under the collective bargaining agreement to enforce a safety program incorporated in the collective bargaining agreement. The provision directly in question was paragraph (e) which called for the creation of a mine safety committee to be selected by the local union. That section of the agreement went on to provide in part that, "[t]he mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its finding and recommendations to the management * * *." The court held that the quoted provision did not impose an enforceable contractual duty upon the union:

> "There can be no doubt that subsection (e) does provide for a union role in dealing with safety at the mine. It indicates that a mine safety committee shall be established

> at each mine with members selected from among the ranks of the union local representing a particular facility. Such committee was established and functioning at the River Queen Mine. The subsection also provides that among other powers the committee 'may inspect any mine development or equipment. . . .' It is apparently contended that this language places a duty to inspect upon the local and International Unions. We do not accept this contention. The use of the permissive 'may' rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created. No liability can be predicated upon the language of subsection (e)."

Bryant is different from the present case in two important regards. First, the plaintiffs in *Bryant* pleaded and sought to recover for breach of contract by the union. In contrast, the plaintiffs in the instant case seek to enforce a tort duty. Secondly, the union in *Bryant* did not undertake any firm duty. In contrast, the Union in the present case did firmly obligate itself by agreeing that the Union steward "shall see that the provisions of these working rules are complied with."

House also differs from the case at bar. In *House*, certain employees filed suit against their employers arising out of a mine fire. The employers then filed third party complaints against the union asserting a right of indemnification and contribution, derived from an alleged right of the union members to sue the union for negligent performance of its duty to enforce mine safety. The provision in the collective bargaining agreement in question provided for a safety committee consisting of three employees designated by the union and three management members. The agreement went on to provide that, "[t]he function of the safety committee shall be to *advise with* the Plant Manager concerning safety and health matters *but not to handle grievances.* * * * Advices of the safety committee, together with supporting suggestions, recommendations and rea-

sons shall be submitted to the Plant Manager for his Company's responsibility to provide for the safety and health of its employees * * *." (Emphasis by Judge Anderson in the *House* opinion). The collective bargaining agreement also provided that any questions concerning safety should be subject to the regular grievance procedures.

Judge Anderson held in the *House* opinion that "[i]n light of the collective bargaining agreement in this case" a theory of common-law negligence is inextricably intertwined and embodied in the union's duty of fair representation; that the duty of fair representation is governed by federal law; and that federal law dictates that the exclusive duty owed by the union is that of fair representation and negligence on the part of the union is insufficient to impose any liability.

Although Judge Anderson intimated that his opinion in *House* was at variance to that of Judge Hunter in *Helton*, the opposition between Judges Anderson and Hunter is more apparent than real. As specifically stated by Judge Anderson, the *House* opinion was rendered in light of the particular collective bargaining agreement involved in that case. That agreement imposed no responsibility upon the union other than in an advisory capacity and in the handling by normal procedure of grievances which might arise out of safety complaints. In contrast, the Union in the present case has gone beyond a mere advisory role and instead has assumed the full duty to "see that the provisions of these working rules are complied with." Furthermore, the Union saw to it that this enforcement function in the hands of its steward should be independent of interference from the employer. So Section 7.20 of the agreement concludes: "It is understood and agreed that the Employer is in no way responsible for the performance of these functions by the steward."

We can readily agree that when a union assumes only an advisory capacity with respect to safety and the enforcement of

safety regulations so far as the union is concerned is limited to only the usual grievance machinery, then the union is carrying out purely a representative function on behalf of its members and should be limited in its responsibility to performing that representation in a fair and honest manner. In such case, the safety situation would be no different from the many cases cited by defendants where a union has been charged with failure to represent its member in the presentation and processing of the employee's grievance and where the union has been held liable only under the test of fair representation. See Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Dente v. International Organization of Masters, Mates and Pilots, Local 90, 492 F.2d 10 (9th Cir. 1974); De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281 (1st Cir. 1970); Bazarte v. United Transportation Union, 429 F.2d 868 (3rd Cir. 1970). In that type of case, the handling of employee grievances are properly treated as no more than a recognized extension of the collective bargaining process.[1]

Here, however, the Union has chosen to go far beyond a mere advisory status or representative capacity in the processing of grievances.[2] Rather, it has taken over for itself a

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[1] It is to be particularly noted that Judge Anderson in *House* was concerned about the practical aspects of opening up unions to liability in tort, and in that connection he speaks in footnote 10 on p. 946 about the potential impact upon the handling of grievances and the overloading of grievance machinery. Such concern would be justified if tort liability were recognized under the facts of *House*. No similar potentiality exists by reason of recognizing tort liability on the part of the Union here for failing to properly perform its duty under Section 7.20 of its agreement.

[2] Section 7.21 of the collective bargaining agreement here does provide for a safety review committee, parallel to the committees provided for in *Bryant* and *House*. Article 8 of the agreement here also provides grievance procedure parallel to that in the two cases mentioned. However, the additional unilateral enforcement power given to the Union steward under Section 7.20 of the contract here is over and beyond anything contained in the *Bryant* or *House* agree-

managerial function, namely the full independent right to enforce safety requirements. With its demand for and successful acquisition of that management right, it must also accept the concomitant responsibility. Under the terms of this particular collective bargaining agreement, the safety responsibility assumed by the Union is separate and distinct from the normal and usual duties of a purely representative nature such as those involved in the processing of grievances. As Judge Hunter properly held in Helton v. Hake, *supra*, defendants here should be held to answer for their breach of tort duty to use due care.

III

Defendants contend next that plaintiffs are barred from recovery because of contributory negligence on the part of Helton. They point to the evidence that Helton was aware of the danger from the power line, that he appreciated the danger, and that he actually expressed apprehension of working in proximity to the power line. However, at the same time, Helton had some right to rely upon the implied assurances of Loethen and Hake that there was no substantial danger and that he was safe in continuing to work.

The rule is well settled that a workman's knowledge of a dangerous condition precludes recovery only where the danger is so obvious that a man of ordinary prudence would refuse to do his employer's bidding; and the question of whether the danger was so obvious and imminent as to make it contributory negligence for him to continue is usually a question for the jury. Burkard v. A. Leschen & Sons Rope Co., 217 Mo. 466,

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ments. While the steward under Section 7.20 could not call a work stoppage to enforce the safety rule of Section 7.28, there were other unilateral enforcement methods available to him, as he conceded in his testimony.

117 S.W. 35 (1909). In judging whether the danger was obvious and imminent, it is proper to take into consideration that the foreman Loethen and the Union steward Hake were present when Helton voiced his apprehensions about the power line, but they both ignored that expression by Helton and despite that protest let the work go forward. Not only that, but they themselves as well as other workmen continued to work at that place and under the same conditions. Still further, even after the accident a number of the workmen, including Hake and Loethen, testified in court that they did not consider the work being done as particularly dangerous. The jury could believe that these other workmen honestly believed the proximity of the power line not to be an imminently dangerous condition and yet believe that they were mistaken in that opinion, with the net result that reasonable and honest men might differ as to whether the danger was obvious and imminent. Cole v. St. Louis Transit Co., 183 Mo. 81, 81 S.W. 1138, 1141 (1904). A number of Missouri cases have held under situations fairly comparable to the one at bar that the injured workman was not contributorily negligent as a matter of law. Burkard v. A. Leschen & Sons Rope Co., *supra*; Cole v. St. Louis Transit Co., *supra*; Laemore v. Lehrack, 248 S.W. 639 (Mo. App. 1923); Nash v. St. Joseph Lead Co., 238 S.W. 584 (Mo. App. 1922).

Defendants assert that Helton had safer alternatives available to him so that his choice of an unsafe manner of work was a voluntary exposure to the risk. They say for example that he should have brought up the angle irons while sitting down rather than standing up. There is considerable doubt from the evidence whether one way was any better accepted than the other. However, even assuming that it would be safer to handle the angle irons while sitting down, the evidence is uncertain and contradictory as to how Helton was actually working. Loethen testified that "when I seen him he was standing up," but Loethen did not see Helton fall. McCormack on the other hand, last saw Helton "crouched down" and "sitting down"

just before he toppled off. Inasmuch as nobody actually saw Helton or just what he was doing at the time of the electrocution, weight should be given to the presumption that he was handling himself and doing his work in a manner which accorded with due care. Privette v. City of West Plains, 93 S.W. 2d 251 (Mo. App. 1936); Hamilton v. Laclede Electric Cooperative, 294 S.W.2d 11 (Mo. 1956).

Defendants make other suggestions as to reasonable alternative ways in which they say Helton might have done his work. However, it appears that he was doing his work in the usual manner, and it does not appear he had been shown any other manner of work either by the foreman or by the Union steward. Under those circumstances he should not be held guilty of contributory negligence as a matter of law. Longacre v. Farmers' Elevator, Mercantile & Manufacturing Co., 246 S.W. 632 (Mo. App. 1923). See also Phares v. Cenutry Electric Co., 336 Mo. 961, 82 S.W.2d 91 (1935).

IV

Defendants complain next that a class action cannot be maintained because there was no showing by plaintiffs that representatives of the class were faily chosen and would adequately and fairly represent the members of the class. They argue that Section 507.070[3] and Rule 52.08 require that a hearing be held with respect to these matters and since there was no such hearing and no evidence on the subject, these provisions have been violated.

Defendants make no mention of Rule 52.10, governing actions by or against unincorporated associations, and which related to the present situation rather than Rule 52.08 which is cited by defendants. See Owens v. Savage, 518 S.W.2d 192

[3] All statutory references are to RSMo 1969.

(Mo. App. 1974). It should be noted that Rule 52.10 provides that "[n]othing in this Rule shall be construed to affect the rights or liabilities of labor unions to sue or be sued." The quoted portion of Rule 52.10 has the purpose of preserving the traditional method by which labor unions sue and are sued. This is under the equitable doctrine of virtual representation which exists independent of statute or court rule. State ex rel. Allai v. Thatch, 234 S.W.2d 1 (Mo. banc 1950).

Inasmuch as under that doctrine the Union is sued in a representative capacity, any challenge to the Union's right to be sued must be by specific negative averment. Section 509.-140 and Rule 55.13. Where, as here, there is no specific negative averment challenging the Union's capacity, no issue in that respect is presented. Heath v. Motion Picture Machine Operators Union No. 170, 365 Mo. 934, 290 S.W.2d 152, 159 (1956).

The application of that pleading rule does no injustice to the class consisting of all members of the Union. Plaintiffs named among the representatives of the class the president, the secretary treasurer and the business agent of the Union. The president of the Union actually appeared at the trial as a witness for the defense. The attorney for the Union has represented the whole class at all stages of this litigation, vigorously and with the utmost of professional skill. The whole purpose of Rule 52.08, which defendants erroneously claim to be applicable, is to insure adequacy of representation for all members of the class and to prevent collusion. City of Des Peres v. Stapleton, 524 S.W.2d 203 (Mo. App. 1975). To any extent that Rule 52.08 is relevant here, its purpose has been well accomplished by the representation in the present case.

V

Defendants complain next that the trial court refused to allow Hake to testify that in his opinion the job was not dangerous. The short answer is that Hake did give testimony on this point and that testimony was never stricken. During the course of his testimony the following appears: "In your opinion, Mr. Hake, was this job dangerous? Answer: No, it wasn't." Although an objection was then made and sustained by the court, the evidence was before the jury and never withdrawn.

Moreover the testimony in question by Hake was merely cumulative of like testimony given by Loethen and McCormack. Assuming that the ruling by the court sustaining the objection to Hake's testimony was error, that error under all the circumstances cannot be deemed prejudicial.

VI

On their cross-appeal, plaintiffs contend that the court erred in refusing to submit Instructions 14, 15, 17 and 18 relating to punitive damages. The point based on these instructions is not properly before us for consideration, because of plaintiffs' violation of Rule 84.04(e) which requires that if a point relates to the refusal of an instruction, "such instruction shall be set forth in full in the argument portion of the brief."

Aside from that, we agree with the trial court that the evidence did not justify the submission of any issue on punitive damages.

No error having been shown on either appeal, the judgment is affirmed. Costs will be divided equally between the parties.

All concur.

SOLBERT M. WASSERSTROM
Judge

APPENDIX B

In the Circuit Court of Missouri
Nineteenth Judicial Circuit—Division 2
Honorable Byron L. Kinder, Judge

Shirley Helton, individually; Shirley Helton, as administratrix of the estate of Norman R. Helton, deceased; Ricky Helton and Jo Ann Helton, by Shirley Helton, their Next Friend,
Plaintiffs,

vs.

Ben Hake; the City of Salem, Missouri, a municipal corporation; and John H. Lyons, General President, Juel D. Drake, General Secretary, James D. Cole, Treasurer, all officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A. F. of L.-C.I.O., and Joseph J. Hunt, Jr., President, Joseph J. Hunt, Sr., Secretary-Treasurer, and Sam Sherell, Business Agent, all officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396, and Raymond D. Rhodes, H. Wayne Rhodes, Thomas J. Shirley, David Kleindienst, and Paul E. Kleindienst, all members of Local 396, all as officers and representatives of a class consisting of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O. and as officers and representatives of a class consisting of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396,
Defendants.

No. 26925

Judgment

On the 2nd day of March, 1976, come the plaintiffs Shirley Helton, Ricky Helton and Jo Ann Helton in person and by their attorneys, and defendants Ben Hake and Joseph J. Hunt, Jr. in person and by their attorneys, and defendants Joseph J. Hunt, Sr., Sam Sherell, Raymond D. Rhodes, H. Wayne Rhodes, Thomas J. Shirley, David Kleindienst and Paul E. Kleindienst, by their attorneys, and announce ready for trial. Thereupon comes a jury, twelve good and lawful men and women of the body of the County, being chosen, tried and sworn upon their oaths to try said cause, and the trial commences, and witnesses on the part of plaintiffs are all duly sworn, examined and evidence adduced on March 2 and 3, 1976, whereupon plaintiffs rest, and defendants move for a directed verdict at the close of plaintiffs' case, which the Court overruled; whereupon witnesses on the part of defendants are all duly sworn, examined and evidence adduced on March 3, 1976, whereupon defendants rest, and defendants move for a directed verdict at the close of all evidence, which the Court overruled.

On the 4th day of March, 1976, after hearing all of the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider the verdict; and after deliberations, the jury returned into open court a verdict signed by ten (10) members of the jury in words and figures as follows:

> "We, the undersigned, find the issues in favor of the plaintiffs and against both defendants, and assess plaintiffs' damages at $150,000.00 dollars.
>
> Vernon Scheulen
> Robert Emling
> Steve Schlueter
> Nadine Marr
> Doris Brown
> Jean C. Toalson

> David Sandbothe
> David Mehmert
> Lawrence R. Weider
> Mike Hoffman, Jr."

On the 8th day of March, 1976, plaintiffs, by their attorneys, freely remit to defendants the sum of $102,500.00 dollars, parcel of the damages by the jury assessed.

IT IS THEREFORE, ORDERED by the Court that plaintiffs recover $47,500.00 dollars from defendants, and that plaintiffs recover from defendants their costs and charges in their behalf expended, and have execution therefor.

Filed:

March 8, 1976

APPENDIX C

In the United States District Court for the
Western District of Missouri
Central District

Shirley Helton, et al.,
Plaintiffs,

vs.

Ben Hake, et al.,
Defendants.

No. 74-CV-59-C

Memorandum and Order Remanding Cause to the Circuit Court for Cole County, Missouri

This cause was instituted by the filing of the petition for relief in the Circuit Court for Cole County, Missouri, on March 15, 1974. The petition for removal to this Court by certain of the defendants was filed on April 12, 1974. Plaintiffs have moved to remand this cause to the state courts, and the removing defendants oppose the motion. For the reasons set forth below, plaintiffs' motion will be sustained and the cause remanded.

Plaintiffs are the surviving spouse and minor children of one Norman R. Helton, now deceased. The defendant in Count I of the three count petition is the City of Salem, Missouri. Defendants in Counts II and III are various members and officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O. and Local 396 of that international union, as representatives of an unincorporated association, pursuant to Rule 52.10 Mo. R. Civ. P.

The petition alleges that on or about September 11, 1973, Norman Helton died as the result of electrocution after coming

into contact with a high tension power line owned and operated by the City of Salem, Missouri. At that time Mr. Helton is alleged to have been working on a construction project immediately adjacent to the power line.

Count I seeks damages from the City of Salem. This Count alleges that the city was negligent in failing to de-energize, isolate or insulate said power line and that therefore it is liable to plaintiffs in the sum of $50,000.

Count II seeks damages from the various members and officers of the union. The essence of this Count is contained in paragraphs 7, 8, and 9 of Count II. Those paragraphs state as follows:

> "7. At all times mentioned herein, defendant Ben Hake was the job steward appointed by representatives of the international and the local on a certain construction project in Dent County near Salem, Missouri, and as such was the agent of the International and the Local on such project.
>
> "8. In a collective bargaining agreement entered into on August 9, 1972, for the years 1972 through 1975, between the Associated General Contractors of St. Louis, Erectors and Riggers Association and Site Improvement Association on one hand and the Local, acting for itself and as agent of the International, on the other hand, it was provided that the job steward shall see that the provisions of the working rules are complied with, that among the working rules included in said agreement is the rule that no work shall be done in the immediate area of high tension lines until the power has been shut off, or the lines insulated, or the safety of the members of the bargaining unit otherwise provided for.
>
> "9. Defendant Hake, while acting in his capacity as job steward and agent of the International and the Local,

negligently and carelessly failed to enforce such rule, and Norman R. Helton, a dues-paying member of the bargaining unit covered by said agreement and for whose benefit said agreement was made, was required and permitted to work in the immediate area of high tension lines without the power being shut off, or the lines insulated, or the safety of Norman R. Helton being otherwise provided for."

Count II then further alleges that as a direct and proximate result of this negligence Norman R. Helton was electrocuted. Plaintiffs pray for $50,000 in damages on this Count.

Count III of the complaint repeats the allegations contained in Count II, and further states that as a result of the electrocution Norman Helton suffered loss of property in the amount of $50.00 and expended $110.00 in medical expenses. In this Count plaintiffs pray for that $160.00 actual damages and, in addition for $200,000 in punitive damages for defendants' alleged "complete indifference to or conscious disregard for the safety of" Norman Helton.

Under the provisions of 28 U.S.C. § 1441(b), any civil action of which the district courts of the United States have original jurisdiction founded upon a claim arising under the Constitution of or laws of the United States is removable to a district court from the state courts without regard to the citizenship or residence of the parties. On this basis, defendants in Counts II and III removed this action, stating that

> "3. Counts II and III of plaintiffs' petition allege that Iron Workers Local 396 failed to fully and adequately enforce its collective bargaining agreement between the Associated General Contractors of St. Louis, Erectors and Riggers Association, and Site Improvement Association, such allegations being within the purview of and constituting a cause of action under Section 301(a) of the Labor Management Relations Act, as amended, 1959, 29 U.S.C.A. Section 185(a).
>
> "4. The District Courts of the United States have original jurisdiction of causes arising under Section 301(a) of the Labor Management Relations Act, as amended 1959, 29 U.S.C.A. Section 185(a)."

Plaintiffs thereupon filed a motion to remand this cause to the state court. The position of plaintiffs on this question, in essence, is that the complaint herein does nothing more than state an action in tort for wrongful death under Missouri law, and hence does not fall within the original jurisdiction granted to the federal district court by Section 301. In their memorandum in opposition to the motion to remand, defendants assert that, in addition to the reasons previously stated, the complaint charges defendants with a failure to adequately represent Helton in good faith, thereby breaching their duty of fair representation. Such a complaint, they assert, falls within the ambit of Section 301's grant of original jurisdiction to the federal district courts.

I

Section 301(a) reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." *Section 301(a) Labor Management Relations Act, as amended, 1959, 29 U.S.C. § 185(a).*

Under this section it is clear that an individual union member may sue his employer for a breach of promise contained

in a collective bargaining agreement between the employer and the employee's union, if the promise breached did confer or was intended to confer a benefit upon the individual employee.[1] And, Section 301(a) does support a suit by an individual union member against his union that seeks to redress union interference with rights conferred upon individual employees by employer promises in the collective bargaining agreement, where it is proved that the interference by the union constituted a breach of the union's duty of fair representation regardless of whether the suit is based upon a collective bargaining agreement. However, a claim of breach of duty of fair representation requires arbitrary, discriminatory, or bad-faith conduct on the part of the union, coupled with substantial evidence of fraud, deceitful action, or dishonest conduct. See *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Smith v. Evening News Association*, 371 U.S. 195 (1962).

The question of whether Section 301(a) will support a suit by a union member against his union for failure of the union to honor rights conferred upon employees by union promises in the collective bargaining agreement has evidently been presented to only one federal appellate court. In *Buzzard v. Lodge 1040 Int. Ass'n of Mach. & A. Wkrs.*, 480 F. 2d 35 (9th Cir. 1973), the Court stated the following:

> "While we have been unable to find any case for the proposition that § 301 will support a suit by a union member against his union for redress from union refusal to honor rights conferred on employees by Union promises in the collective bargaining agreement, we are convinced that § 301 does confer such jurisdiction. The union's duty of fair representation is equally violated when it refuses arbitrarily and in bad faith to honor its obligations, under a collective bargaining agreement, which are designed to benefit its members.
>
> "Of course, for such a claim to succeed, there must be 'substantial evidence of fraud, deceitful action, or dishonest conduct (citing cases)." *Buzzard, supra*, 480 F. 2d at 41.

[1] No recovery is sought against the employer in this suit.

It is clear from the above and from the cases previously cited, that the instant complaint does not allege any breach on the part of the union of its duty of fair representation. The complaint only alleges a negligent failure to perform a duty as promised under the contract. There are no allegations of any arbitrary, discriminatory or bad faith actions on the part of the union or any of its agents. There are no allegations of refusal by the Union to honor rights conferred upon employees by union promises in the collective bargaining agreement. Hence, defendants' contention that this complaint alleges a breach of the union's duty of fair representation and thereby confers upon this Court original jurisdiction under Section 301, is without merit and cannot be sustained. Removal accordingly cannot be predicated upon that basis.

II

The question then remaining is whether the complaint herein can be categorized as a "suit for violation of (a) contract(s)" so as to confer Section 301 original jurisdiction in this Court. The complaint predicates its claim for relief upon the "negligent and careless" failure to enforce a work rule by the shop steward, enforcement of such rule being a duty assumed by the union in the collective bargaining agreement, arguably, and obviously, for the benefit and protection of its members.

The only reported case in which a federal appellate court has confronted itself with a factual and contractual context similar to that raised by the instant complaint appears to have been in *Bryant v. International Union, U.M.W. of America,*

467 F. 2d 1 (6th Cir. 1972), which arose out of a 1968 mine disaster in which nine miners were killed. In that case, suit was brought under Section 301 against the employer and the union. The collective bargaining agreement had adopted by reference the Federal Mine Safety Code. Plaintiffs' complaint alleged that the employer had failed to conform its operations to the Safety Code's requirements, and that the union had failed to enforce compliance with the Code, a duty that the union had undertaken in the collective bargaining agreement. Summary judgment was granted by the District Court against the plaintiffs and in favor of all defendants. Only the plaintiff's complaint against the union was appealed. The Sixth Circuit, without ever addressing itself to the question of jurisdiction, and after assuming plaintiffs had standing to sue, held that the contract did not impose any mandatory, affirmative duty upon the defendant union upon which liability against the union could be predicated for the union's failure to perform.

With particular reference to this case, plaintiffs in Bryant alleged, among other things, that the union had breached its obligations under the collective bargaining agreement by failing to make periodic inspections of the mine. However, the use in the contract of the term "may inspect" the mines led the Court to conclude that no affirmative duty to inspect the mines was imposed upon the union by the agreement, but rather the agreement only granted a privilege to the union to inspect, if it chose to do so.[1]

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[1] It is unclear whether or not this part of the complaint of the various plaintiffs was predicated upon § 301 jurisdiction, or whether it was brought under the pendent jurisdiction of the District Court. As the Court of Appeals construed the complaint to allege a breach on the part of the Union of its duty of fair representation arising out of promises in the collective bargaining agreement, and as such a complaint clearly falls within the ambit of § 301 (Vaca v. Sipes, supra) this part of the complaint would appear to be within the pendent jurisdiction of the district court under the principles of *United Mine Workers v. Gibbs,* 383 U.S. 715 1966), arising out of a common nucleus of operative fact, etc.

In the instant case, taking the allegations contained in the complaint as true, the contract did impose upon the defendant union an affirmative duty to enforce safety rules. The complaint alleges that the union, through its agent, the steward, negligently and carelessly failed to enforce the safety rule relating to work in the area of high tension power lines. The suit is clearly brought as an action in tort seeking recovery for wrongful death due to the alleged negligence of the defendants. The only relevance of the collective bargaining agreement appears to be that it would determine, to some extent at least, the nature and scope of defendants' duty. That defendants' duty may have arisen under a contract does not in and of itself change the basic nature of this action, which is a suit in tort to recover damages for injuries sustained due to defendants' alleged negligence. Compare Aetna Ins. Co. v. Hellmuth, Obata & Kassenbaum, Inc., 392 F. 2d 472 (8th Cir. 1968).[1]

Essentially, defendants' position is that plaintiffs' complaint is brought to "enforce" the collective bargaining agreement, and because some interpretation of that agreement appears to be necessary, Section 301(a) confers jurisdiction upon this Court.[1] Defendants argue that because any duty imposed upon defendants was imposed under the collective bargaining agreement, and as the complaint alleges a failure to perform that duty, this is an

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[1] In Aetna, the Eighth Circuit in an opinion written by Chief Judge Gibson, held that an architect may be sued on principles of general negligence for a negligent failure to supervise a construction project, where the duty to supervise was based upon a contract between the builder and the architect.

[1] It is evident that some contract interpretation may be necessary in this cause, in order to determine the nature and scope of the contractual duty to enforce the work rules, etc. In so much as interpretation of the contract is necessary, that interpretation should, in this situation, be governed by applicable principles of federal labor law, whether that interpretation is made by this Court or a state court. Compare *Bryant v. International Union, U. M. W. of America,* 467 F. 2d 1 (6th Cir. 1972), citing *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957).

action "for violation" of a collective bargaining agreement within the meaning of Section 301(a).

This Court has not been able to find any reported case in which any federal court has held that the mere negligent failure by the union to perform a duty owed only to its own members under a collective bargaining agreement has been held sufficient to invoke Section 301(a) jurisdiction, where the failure resulted in a personal injury and the suit seeks relief via damages predicated upon negligence for the injury sustained. The case law as to whether such an action in this regard is maintainable under Section 301(a) is, at best, unclear. Neither *Motor Coach Employees v. Lockridge, supra,* nor *Vaca v. Sipes, supra,* address themselves to this question. In *Bryant v. Int. Union, U. M. W of America, supra,* the jurisdictional question was not specifically addressed by the Sixth Circuit, and the contract did not provide for a mandatory affirmative duty on behalf of the Union to inspect the mines for compliance with the safety rules and regulations. As noted previously the Ninth Circuit in 1973 took the position that a Section 301(a) suit by a member-employee against his union will lie for union breaches of contractual promises in the collective bargaining agreement creating duties owed by the union to its member-employees. See *Buzzard v. Local Lodge 1040 Int. Ass'n of Mach. & A. Workers, supra.* And see *Beriault v. Local 40, Super Cargoes & Checkers of I.L.W.U.*, 501 F. 2d 258 (9th Cir. 1974). However, in *Dente v. International Org. of Masters, Mates & Pilots, Local 90,* 492 F. 2d 10 (9th Cir.) (December 5, 1973), cert. den. 94 S. Ct. 2607 (1974), the Ninth Circuit noted that an employee's right to sue his union under Section 301(a) is limited to those situations in which the union's breach of duty rises to the level of a denial of the duty of fair representation.

In *Richardson v. Comm. Wkrs. of America,* 443 F. 2d 974 (8th Cir. 1971), the plaintiff employee brought suit against both the employer and the union for wrongful discharge and

for discrimination. The suit against the union was predicated upon Section 301(a) jurisdiction arising out of a clause of the collective bargaining agreement that prevented the union from discriminating against employees due to membership or non-membership in the union, and from intimidating or coercing any employee into joining the union or continuing membership therein. The factual context involved an employee who had withdrawn from union membership and was thereafter harassed by union members and eventually wrongfully discharged, for alleged violations of company rules, at the urging of the union. The Eighth Circuit held that the essence of plaintiff's claim against the union was not for breach of contract, but rather for breach of the union's duty of fair representation. In that context, the Court stated:

> "Breach of the agreement by the bargaining agent, which simultaneously conflicts with its role as a fiduciary to the employee, creates a claim for breach of trust of its statutory duty to give adequate representation, and not for one arising out of the collective bargaining agreement." *Richardson v. Comm. Wkrs of America, supra,* 443 F. 2d at 980."

Further, the Court noted that

> "The focal issue in a § 301 suit is the employer's noncompliance with the collective bargaining agreement, and the union's complicity in that breach." *Richardson v. Comm. Wkrs. of America, supra,* 443 F. 2d at 981.

Richardson is clearly distinguishable from the instant case, for the obvious reason that the union breach involved, whether considered a breach of the duty of fair representation or a breach of contract, involved deliberate conduct by the union, while in the present case, the conduct complained of is negligence, and not an intentional wrongful course of conduct. Nevertheless, *Richardson* does militate against holding that the conduct com-

plained of herein is jurisdictional under Section 301(a). The central issue raised by the complaint does not concern any wrongful act or failure to act on the part of the employer, but is based totally upon a negligent act or failure to act on behalf of the union, arising out of a duty owed to the employee by a specific union promise contained in the collective bargaining agreement. As previously stated, no claim for a breach of the duty of fair representation is made by the plaintiffs.[1]

It is this Court's conclusion, in view of all of the foregoing that the complaint herein cannot properly be considered a suit for violation of a contract within the meaning of Section 301(a). Rather, this is a suit predicated upon negligence, seeking damages for the alleged wrongful death of plaintiffs' deceased. Merely because some interpretation of the contract appears to be necessary to the determination of the nature, scope or extent of the duty owed does not, in and of itself, categorize this cause as an action for violation of the contract so as to grant jurisdiction to this Court under Section 301(a). To adopt defendant's view in this case would lead to the inescapable conclusion that any case in which interpretation of a collective bargaining agreement may be involved vests jurisdiction in the federal district courts under Section 301(a), regardless of the actionable wrong complained of or the relief sought, or how directly or indirectly related the collective bargaining agreement is to the action. While this Court recognizes that jurisdiction under Section 301(a) is not limited to mere breach of contract actions, and is designed

[1] Defendants, in their separately filed motion to dismiss the complaint, contend that this complaint is really only a suit for denial of fair representation, and that as such, it fails to state a claim upon which relief could be granted because it alleges only negligent conduct on the part of the union defendants. Defendants further argue that a suit for denial of fair representation is the only method by which the union's actions can be challenged. Were this Court to adopt this rationale, it would lead to the inevitable result that a union's negligent performance or negligent failure to perform a duty owed to an employee which resulted in that employee being injured would not be actionable in any way.

as a method for deciding suits brought to implement federal labor law and policy (see *Richardson v. Comm. Workers of America, supra,* citing *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1957)), this Court cannot conclude that this negligence action to recover damages for wrongful death falls within Section 301's ambit. Plaintiffs herein are not praying for reinstatement or back wages, or for an improvement in working conditions. They are not employees or union members, but rather survivors bringing suit under the Missouri wrongful death law. Defendants have not suggested and it does not appear that any overriding federal labor policy is present that would warrant a construction of Section 301 to grant jurisdiction to this Court in this case.[1]

Accordingly, for the reasons stated, this Court concludes that this cause was removed to this Court improvidently and without jurisdiction. Therefore, pursuant to the mandate of 28 U.S.C. § 1447(c) it is hereby

ORDERED that this cause be, and hereby is, remanded to the Circuit Court for Cole County, Missouri, for all further proceedings. No costs assessed.

/s/ ELMO B. HUNTER
U. S. District Judge

[1] The best that can be said for defendants' arguments regarding jurisdiction is that jurisdiction under Section 301 is questionable. As such, were this Court to retain this action, neither party would be foreclosed from later questioning jurisdiction on appeal. See *American Fire & Casualty Co. v. Finn,* 341 U.S. 6 (1951). In such circumstances, the better course is to remand the cause to the state courts, so that the court determining the merits of the case will have subject matter jurisdiction. State courts have concurrent jurisdiction in Section 301 cases. *Motor Coach Employees v. Lockridge, supra,* 403 U.S. at 298.

APPENDIX D

Important Notice

Missouri Court of Appeals
Kansas City District

Date: April 3, 1978

In Re: Shirley Helton, et al. v. Ben Hake, et al.
28896-28897

KCD No. H4

Appellant Motion for rehearing overruled.
Transfer to Supreme Court denied. See Rule 83.03
cc: Kelly Pool, Barry J. Levine

Mary Louise Thomas, Clerk

APPENDIX E

No. 60723

In the Supreme Court of Missouri
Kansas City District No. 28896

January Session 1978

Shirley Helton, et al., Respondents

vs. Transfer

Ben Hake, et al., Appellants

Now at this day, on consideration of appellants' application to transfer the above entitled cause from the Kansas City District Court of Appeals, it is ordered that said application be, and the same is hereby denied. Bardgett, J., would sustain application. State of Missouri—SCT.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1978, and on the 9th day of May, 1978, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 9th day of May, 1978.

THOMAS F. SIMON, Clerk
By JANICE B. HANSON, D. C.

Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-407

BEN HAKE; JOSEPH J. HUNT, JR., President, JOSEPH J. HUNT, SR., Secretary-Treasurer, and SAM SHERELL, Business Agent, All Officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396, and RAYMOND D. RHODES, H. WAYNE RHODES, THOMAS J. SHIRLEY, DAVID KLEINDIENST, and PAUL E. KLEINDIENST, All Members of Local 396, and As Officers and Representatives of a Class Consisting of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396,

Petitioners,

vs.

SHIRLEY HELTON, Individually; SHIRLEY HELTON, As Administratrix of the Estate of Norman R. Helton, Deceased; RICKY HELTON and JO ANN HELTON, by SHIRLEY HELTON, Their Next Friend,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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BEN HAKE; JOSEPH J. HUNT, JR., President, JOSEPH J. HUNT, SR., Secretary-Treasurer, and SAM SHERELL, Business Agent, All Officers of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396, and RAYMOND D. RHODES, H. WAYNE RHODES, THOMAS J. SHIRLEY, DAVID KLEINDIENST, and PAUL E. KLEINDIENST, All Members of Local 396, and As Officers and Representatives of a Class Consisting of the International Association of Bridge, Structural and Ornamental Iron Workers, A.F. of L.-C.I.O., Local 396,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Respondents adopt Petitioners' statement of the opinions below.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Respondents disagree that the question presented is as stated in the Petition. The question presented is whether a state common law negligence action requires the application of federal labor law where the labor union's duty of exercising reasonable care toward plaintiffs' deceased was created in the collective bargaining agreement.

STATUTE INVOLVED

Respondents disagree that Section 301(a), Labor Management Relations Act, as amended 1959, 29 U.S.C. §185(a) is involved. This action is not a suit for violation of a contract between an employer and a labor organization but is a common law negligence action based upon the labor union's violation of a duty to exercise reasonable care toward plaintiffs' deceased.

STATEMENT

Petitioners' statement of the case is substantially correct.

REASONS FOR DENYING THE WRIT

Petitioners have attempted to characterize this action as one based upon a failure to enforce a collective bargaining agreement or as one involving the duty of fair

representation. However, the essence of this action, as recognized by both the Missouri Court of Appeals, Kansas City District, *Helton* v. *Hake*, 564 S.W.2d 313 (Mo. App., D.K.C. 1978), and the Federal District Court, Western District of Missouri, *Helton* v. *Hake*, 386 F. Supp. 1027 (W.D. Mo. 1974), is the negligent failure of the union to act, "arising out of a duty owed the employee by a specific union promise contained in the collective bargaining agreement." The only relevancy of the collective bargaining agreement is its creation and definition of the extent of the duty which was violated by the petitioners. Missouri courts have long recognized that liability in negligence may arise from breach of a duty imposed by contract. *Helm* v. *Inter-Insurance Exchange*, 354 Mo. 935, 192 S.W.2d 417 (En Banc 1946); *Braun* v. *Riel*, 40 S.W.2d 621 (Mo. 1931). The union specifically agreed that it would enforce the safety rules and that the employer was not responsible for the performance of these functions (Respondents' Exhibit 16, page 28). Violation by the union of this specific obligation resulted in the death of plaintiffs' deceased and is the basis of this negligence action.

Petitioners cite *Bryant* v. *United Mine Workers*, 467 F.2d 1 (6th Cir. 1972), for the proposition that imposing liability on unions for the employer's failure to comply with safety standards would discourage the inclusion of similar or more effective standards in future labor contracts. While this statement may be true, it has little relevancy to the present action. Liability in the present case was not imposed upon the union for the employer's failure to comply with safety standards but for the union's failure to comply with its specific agreement to assume responsibility for enforcement of safety rules. As indicated by the Missouri Court of Appeals, Kansas City District, *Helton* v. *Hake*, 564 S.W.2d 313 (Mo. App., D.K.C.

1978), if the union is to demand and successfully acquire the full, independent right to enforce safety requirements, it must also accept the accompanying responsibility—the responsibility of responding in damages where its failure to perform its duty results in the death of a beneficiary of that duty. Furthermore, the court in *Bryant* predicated its holding that the collective bargaining agreement imposed no duty to enforce safety rules upon the union on the specific language of the agreement. The agreement provided that the union "may inspect any mine development or equipment." The court said that "[t]he use of the permissive 'may' rather than obligatory language in the clause clearly negatives the possibility that any duty was to be created." *Id.* at 5. The implication of this language is that if the duty is clearly specified in the agreement, the union will be liable for breach of such duty. This is precisely the situation in the present case. The union assumed sole responsibility for the enforcement of safety rules and failed to do so.

Petitioners further argue that respondents' cause of action against petitioners is preempted by federal labor law, citing *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971), and other cases. However, *Lockridge* is ably distinguished by the Missouri Court of Appeals. That court recognized that the failure of the union to perform the specific duty it had assumed in the collective bargaining agreement was in no way protected by Section 7 of the National Labor Relations Act nor was it an unfair labor practice under Section 8 of that Act.

Respondents' cause of action in this proceeding is and always has been predicated upon the negligence of petitioners in failing to perform a duty created by a specific provision in the collective bargaining agreement. Furthermore, the decision of the courts below will in no way

frustrate or interfere with any national labor policy. The labor union in this case has chosen to assume more than the responsibility of advising and representing its members but has further specifically assumed sole responsibility for enforcement of safety rules. The law has long recognized an employer's duty to furnish a safe worksite, and the union in this case assumed this duty. The union's negligent failure to meet this responsibility is the basis of this suit.

CONCLUSION

Upon all the reasons set forth herein, respondents respectfully submit that this petition for a writ of certiorari should be denied.

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